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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

CARL GENE COLLINS, ROBERT W. PEUFFIER,

Petitioners,

v.

MAC-MILLAN BLOEDEL, INC., JOHN CRANE CO., INC., and OWENS-ILLINOIS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does 28 U.S.C. § 1407(a) permit the Judicial Panel on Multidistrict Litigation to remand a civil action to the transferor court, but hold the punitive damages issues with the transferee court?

PARTIES TO THE PROCEEDING

Petitioners

Carl Gene Collins, Robert W. Peuffier

Respondents

Mac-Millan Bloedel, Inc., John Crane Co., Inc., and Owens-Illinois, Inc.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is published at 233 F.3d 809, and is attached as Appendix A.

JURISDICTION

The court of appeals' order was entered on December 1, 2000. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1). *See Will v. Calvert Fire Ins. Co.*, 437 U.S. 655 (1978) (certiorari jurisdiction over a mandamus order of a court of appeals.)

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES INVOLVED

Appended as Appendix B is 28 U.S.C. § 1407.

STATEMENT OF THE CASE

Eight years ago, the Judicial Panel on Multidistrict Litigation transferred all pending federal asbestos personal injury damages cases to Judge Charles Weiner in the Eastern District of Pennsylvania. But the MDL story the Panel set out to write in 1991 – with its utopian vision of global resolution of asbestos cases – has not and will not come to pass. Instead, MDL 875 has created interminable delays for thousands of plaintiffs whose cases have been transferred. A consolidation that began as an effort to streamline the resolution of asbestos cases has instead

prevented the vast majority of those cases from reaching trial, even when discovery has been completed and settlement efforts have been exhausted. Now, a transferee court charged with the limited, procedural authority to coordinate common discovery has instead chosen to undertake the substantive task of preserving the assets available to satisfy asbestos claims by refusing to remand punitive damage issues even after remanding the rest of the case. The question is whether Congress intended for the Judicial Panel on Multidistrict Litigation to have this extraordinary substantive power by enacting the procedures which allow Multidistrict litigation, powers usually wielded by Congress, State Legislatures, State Courts and federal Bankruptcy Courts.

The Third Circuit affirmed the superlegislative decision of the Judicial Panel, holding that Section 1407 permits unlimited fragmentation of punitive damages from asbestos cases.

The Petitioners are two people who have already died of malignant mesothelioma, Messrs. Peuffier and Collins. In the district court assigned all federal asbestos cases, they moved to remand their claims for trial. The MDL court, in line with its stated policy of giving priority to cancer victims, suggested that the Petitioners' claims be remanded, except for the prayers for punitive damages. The Judicial Panel did as the transferee court suggested, and entered orders remanding the actions, sans punitive damages. The Petitioners specifically moved the Panel to remand the punitive damages issues, whereafter the Judicial Panel heard argument and then entered orders refusing to remand the punitive damage issues. A Petition for Writ of Mandamus was then filed with the

Third Circuit Court of Appeals, which denied the Petitioners' Writ with opinion.

REASONS FOR GRANTING THE WRIT

A. Mandamus Is the Appropriate Remedy to Correct the Judicial Panel on Multidistrict Litigation's Failure to Exercise Its Duty to Remand

The Third Circuit's opinion treats this mandamus proceeding just as any other, with all of the traditional deference normally affording such extraordinary writs. Petitioners believe that at the outset, the Third Circuit erred by applying the transitional mandamus rubric without taking into account the fact that the Congress has already made the determination that mistakes of the Judicial Panel should be corrected via the procedural mechanism of the writ of mandamus. Since such writs are available at common law, Congress's specific instruction that the Panel be reviewed through mandamus would be superfluous unless the intention was to relax the standards applicable to this statutory mandamus remedy, so that if legal error was made, it can be corrected. Under the Third Circuit's approach, legal error can (and did) go unremedied because of additional barriers to review presented through application of common law mandamus standards of review.

Here, under any set of standards, Petitioners had before the circuit court a "clear and indisputable" right to mandamus because the Judicial Panel failed to exercise its statutory duty to remand Petitioners' prayers for punitive damages to the transferor district courts pursuant to 28

U.S.C. § 1407(a), since the rest of their civil actions had been remanded. The Panel's duty to follow the clear dictates of Section 1407 are "impervious to judicial discretion," *Lexecon, Inc. v. Milberg, Weiss, Bershad, Hynes & Lerach*, 118 S. Ct. 956, 962 (1998).

B. 28 U.S.C. § 1407(a) Does Not Permit the Judicial Panel to Remand a Civil Action to the Transferor Court, But Retain the Issues Pertaining to the Prayers for Punitive Damages

The relevant statutory authorization reads as follows:

> Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district court from which it was transferred unless it shall have been previously terminated: *Provided, however,* That the panel may separate any *claim, cross-claim, counter-claim, or third-party claim* and remand any of such claims before the remainder of the action is remanded.

28 U.S.C. § 1407(a) (underlining added). As this Court made clear in the *Lexecon* case, the powers of the Panel are limited by the plain meaning of the enabling statute, 28 U.S.C. § 1407. *Lexecon*, 118 S. Ct. at 962. Thus, the question presented here is one of statutory construction – the legal issue of whether in the MDL statute's Proviso, Congress intended a prayer for punitive damages to be considered either a "claim, cross-claim, counter-claim, or third-party claim."

Statutory language must, if possible, be given its plain, ordinary, meaning. *See, e.g., K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 108 S. Ct. 1811, 1817, 100 L.Ed.2d

313 (1988). Here, Congress's language is indeed clear that prayers for punitive damages are not to be considered either a "claim, cross-claim, counter-claim, or third-party claim." In Section 1407, Congress refers to the entire case subject to MDL transfer as a "civil action" or "action." Congress states that the "action" may be remanded at or before the conclusion of coordinated pretrial proceedings. Congress then states the Proviso, allowing the Panel to separate a "claim, cross-claim, counter-claim, or third-party claim," and permitting the Panel to remand any of those *claims* before the "remainder of the *action*."

The structure of the statute could not be any clearer. The "action" is the primary "unit," consisting of the entire "civil action" as that familiar term is used in Rule 2, Federal Rules of Civil Procedure. Then, by including the partial remand Proviso, Congress allows only certain sub-units of an "action" to be separated and remanded, those sub-units being either a "claim, cross-claim, counter-claim, or third-party claim."

Obviously, a prayer for punitive damages is neither a "cross-claim" (Rule 13(g), FED. R. CIV. P.), nor a "counter-claim" (Rule 13(a-f), FED. R. CIV. P.), nor a "third-party claim" (Rule 14, FED. R. CIV. P.). Is a prayer for punitive damages a "claim" as that term was used by Congress? Obviously not. Since the "action," the entire unit, and partial remands are specifically authorized for all the varieties of ways that a *defendant* brings *its causes of action* against the plaintiff or others (*i.e.*, cross-claims, counter-claims and third-party claims), the only logical and plain meaning which can be attributed to the term "claim" is, of course, the *plaintiff's causes of action* against the defendant.

Other than the plain meaning of this statute, there is ample additional authority making it crystal clear that where Congress desires to give courts the authority to fragment actions into "issues" – that is, small legal units incapable of existing as free-standing causes of action – *it simply says so*. Especially significant here is contrasting the language of Section 1407(a), with Rule 42(b), Federal Rules of Civil Procedure. For the purpose of remand, Section 1407(a) permits the Panel to fragment civil actions into the following constituents: "claim, cross-claim, counter-claim, or third-party claim." However, Rule 42(b) allows a district court to "order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, *or of any separate issue*." Rule 42(b), FED. R. CIV. P. (emphasis added). Congress's contemporary usage is certainly strong evidence that Congress meant what it said in Section 1407, and did not intend for civil actions to be partially remanded unless what is left behind can exist as a free-standing cause of action, as is the case with claims, cross-claims, counterclaims and third-party claims.

In addition, in proposing amendments to Section 1407, Congress has specifically discussed punitive damages in terms of such prayers being "issues" in an action, not "claims." This, again, provides ample support for the proposition that Congress meant what is said in Section 1407, and that punitive damages prayers do not constitute "claims" as that term is used in Section 1407 – although given the statute's plain meaning, nothing more is required and the inquiry is finished. But, on two separate occasions, the House of Representatives has suggested certain reforms regarding the matter of punitive damages in Multidistrict Litigation. The House passed

the "Multiparty, Multiforum Jurisdiction Act of 1990," H.R. Rep. 101-515, H.R. Rep. No. 515, 101st Cong., 2nd Sess. (June 1, 1990) and the "Multiparty, Multiforum Jurisdiction Act of 1991," H.R. Rep. 102-373, H.R. Rep. No. 373, 102nd Cong., 1st Sess. (Nov. 25, 1991).

In these Acts, Congress stated as follows:

> For similar reasons, the bill permits joint trial of *punitive damage issues*. Whereas case-to-case variations in facts relevant to resolving compensatory damage issues will ordinarily be such that there is no net gain to having those issues tried by a single court, that is not the case with *punitive damage issues*; moreover, by consolidating punitive damage determinations, the risk of inappropriate, multiple punitive damage awards is reduced.

It is clear that Congress did not intend for the Panel to engage in partial remands unless what is remanded, and what remains, are both free-standing causes of action capable of adjudication as such.

The question that remains is only whether a prayer for punitive damages can be considered a cause of action brought by a plaintiff against another party. Cases considering this issue have uniformly *rejected* the position that a prayer for punitive damages is a "cause of action" – as opposed to being simply a form of relief available to a party based upon the nature of the underlying causes of action pleaded. *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) ("A punitive damage claim is not an independent cause of action or issue separate from the balance of a plaintiff's case.") (Kansas law); *Lund v. J.C. Penney Outlet*, 911 F. Supp. 442, 445 (D. Nev. 1996)

("Defendant points out, correctly, that punitive damages are a remedy, not a cause of action.") (Nevada law); *Brooks v. Bank of Boulder*, 891 F. Supp. 1469, 1480 (D. Colo. 1995) ("A claim for exemplary damages is not an separate and distinct claim, but is auxiliary to an underlying claim for actual damages.") (Colorado law); *Kleinwort Benson North America, Inc. v. Quantum Fin. Services, Inc.*, 181 Ill. 2d 214, 224, 692 N.E.2d 269, 274 (1998) ("punitive damages are a type of relief, not an independent cause of action."); *Bird v. Rozier*, 948 P.2d 888, 892 (Wyo. 1997) ("if a plaintiff has failed to establish his basic cause of action, there is no separate cause of action for punitive damages alone."); *Bennett v. McKibben*, 915 P.2d 400, 405 (Okla. App. 1996) ("A plea for punitive damages is generally considered to be an element of recovery on an underlying cause of action: it is not a separate cause of action."); *DeBry v. Cascade Enterprises*, 879 P.2d 1353, 1359 (Utah 1994) ("There is no cause of action as such for punitive damages."); *Rocanova v. Equitable Life Assurance Soc. of the U.S.*, 83 N.Y.2d 603, 616, 634 N.E.2d 940, 945 (1994) ("A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action such as fraud."); *McLaughlin v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 23 Cal.App.4th 1132, 1164, 29 Cal.Rptr.2d 559, 579 (1994) ("In California, there is no separate cause of action for punitive damages."); *Kirkbride v. Lisbon Contractors, Inc.*, 521 Pa. 97, 101, 555 A.2d 800, 802 (1989) ("If no cause of action exists, then no independent action exists for a claim of punitive damages since punitive damages is only an element of damages."); *Brown v. Maxey*, 124 Wis.2d 426, 431, 369 N.W.2d 677, 680 (1985) ("We stress that punitive damages are in the nature

of a remedy and should not be confused with the concept of a cause of action."); *Pringle Tax Service, Inc. v. Knoblauch*, 282 N.W.2d 151, 154 (Iowa 1979) ("Exemplary damages . . . are only incidental to the main cause of action."); *Kang v. Harrington*, 59 Haw. 652, 660, 587 P.2d 285, 291 (1978) ("An award of punitive damages is purely incidental to the cause of action."); *Martin v. Cambas*, 134 Or. 257, 261, 293 P. 601, 603 (1930) ("Exemplary damages can never constitute the basis of a cause of action.").

Reviewing the opinion of the Third Circuit, it becomes very clear that the Circuit Court decided this case from a perspective other than one of statutory construction. This proceeding concerns Congress's intended meaning of the phrase "claim, cross-claim, counter-claim or third-party claim" in the Multidistrict Litigation statute. This proceeding did not and does not concern the questions of (1) whether it is good public policy for the MDL statute to be used for purposes of asset preservation of asbestos defendants; (2) whether or not the Judge presiding over the MDL proceedings is doing a good job of settling asbestos cases; (3) whether or not there is "too much" asbestos litigation in federal (or state) courts; or (4) what plaintiffs are more or less deserving of compensation. These decisions are, under our Constitution, entrusted to others; the Congress, the Legislatures of the several states, the State Courts as they continue to develop their tort laws and federal Bankruptcy Courts which, at the specific behest of Congress, enforce and administer Title 11 of the United States Code.

The Third Circuit's opinion is flawed legally too, irrespective of the policy concerns which apparently drove the result. First, the court placed significance in the

fact that some courts try punitive damages separately under Rule 42(b). Yet, it is quite unremarkable that federal courts have separated punitive damage issues for trial, as Rule 42(b) clearly allows separate issues to be tried separately. In no way does this kind of separation indicate that punitive damages constitute "claims" under Section 1407, especially since that section has language that omits the ability to separate "issues," unlike Rule 42(b).

Similarly, there is no significance of the fact that in order to recover punitive damages, a plaintiff must bring forward proof of facts which are independent of the proof used to establish liability. This logic proves too much, as it is equally true that a plaintiff must bring forward proof of facts which are independent of the proof used to establish liability, to recover *actual* damages. A lawsuit seeking naked damages, *i.e.*, a suit for the damages attributed some legal wrong, obviously cannot be brought unless attached to some cause of action for which damages are recoverable. Punitive damages are just the same. As far as "independent" proof to show punitive damages is concerned, the same can be said of actual damages. Obviously, one needs to prove certain facts to show the amount and nature of damages and that proof is separate and apart from facts needed to establish liability or duty. Consequently, it is of no moment with regard to the meaning of the term "claim" that punitive damages must be proved using evidence that is unique to those kinds of damages.

Another line of reasoning is that punitive damages have been characterized by some writers as "dependent claims for relief." There is no force to this logic, and it

certainly does not convert what is one of many separate issues in a tort case into a claim for relief. Punitive damages are certainly "dependent" upon other aspects of a case, whether it is duty, causation or actual damages. Nevertheless, there is no "cause of action" for punitive damages which can be brought independently of the cause of action which includes actual damages. In other words, such an action is not "free-standing," and as such is not what the Congress recognized in Section 1407 as a "claim." Returning at this point to the primary issue of statutory interpretation – the contrast between Section 1407 and Rule 42(b) – it is clear that the operative distinguishing feature is that Rule 42(b) allows separation of litigation sub-units that cannot be litigated on a free-standing basis, while the less expansive language of Section 1407 does not permit remands where what is separated cannot be litigated on a free-standing basis. As a result, the characterization of punitive damages as "dependent" upon other facts or causes of action is a red herring which is of no moment to the question of whether punitive damages are "claims" under Section 1407.

Because the plain meaning of the term "claim" does not encompass a prayer for punitive damages, neither the transferee court nor the Panel had any authority to separate the punitive damage issues from the remainder of the action. Therefore, since the remainder of this action has been remanded, the punitive damage issues must be remanded as well, and the Third Circuit erred.

CONCLUSION

The Third Circuit Court of Appeals and the Judicial Panel on Multidistrict Litigation committed clear and indisputable error by acting outside the confines of Section 1407 by ordering a partial remand of the Petitioners' cases leaving behind the punitive damages issues. Only this Court can correct the clear, indisputable, and manifestly unfair error committed by refusing to remand their punitive damages prayers for relief. Petitioners respectfully ask this Court to grant this Petition for Certiorari and correct these errors.

Respectfully Submitted,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX A

United States Court of Appeals, Third Circuit.

In re Mary Nell COLLINS, Individually and as Personal Representative of the Heirs and Estate of Carl Gene Collins, Deceased,
In re Barbara and Frederick Hoffman,
In re Marjorie Peuffier, Individually and as Personal Representative of
the Heirs and Estate of Robert Peuffier, Deceased, Petitioners.

No. 00-1009.

Submitted Pursuant To Third Circuit L.A.R. 34.1(a)
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Filed Dec. 1, 2000.

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Before: BARRY, ROSENN, and WEIS, Circuit Judges.

OPINION OF THE COURT

WEIS, Circuit Judge.

Petitioners seek a writ of mandamus directing the Judicial Panel on Multidistrict Litigation to remand punitive damages claims for trial together with the remainder of personal injury claims arising from asbestos exposure. We will deny the petition for mandamus.

Petitioners are four individuals seeking damages for injuries resulting from exposure to asbestos. Pursuant to 28 U.S.C. § 1407(a) the claims were transferred by the Judicial Panel on Multidistrict Litigation to Multidistrict Litigation No. 875, which is pending in the United States District Court for the Eastern District of Pennsylvania.

At the suggestion of the transferee judge, when the Judicial Panel remanded the petitioners' claims to the transferor courts, it withheld remand on the requests for punitive damages. This action was consistent with the transferee court's practice in multidistrict litigation asbestos cases over the past decade of retaining demands for punitive damages while allowing the compensatory matters to proceed to trial. The practice has been noted by this Court before. *See In re Patenaude*, 210 F.3d 135, 140 n. 3 (3d Cir.2000) ("The [transferee] court also has a practice when it does remand cases of severing and retaining jurisdiction over punitive damages claims."); *Dunn v. HOVIC*, 1 F.3d 1371, 1400 n. 13 (Weis, J., dissenting).

Petitioners contend that in "undertak[ing] the substantive task of preserving the assets available to satisfy

asbestos claims by refusing to remand the punitive damages issue," the Panel is overstepping its authority. They argue section 1407(a) only permits the Panel to separate "claims," but requests for punitive damages do not have the characteristics of independent claims because a party cannot bring an action for such awards in isolation. On that basis, petitioners assert that the law treats punitive damages as a form of relief, not a claim or cause of action.

Respondents point out that claims for punitive damages, although dependent on factors justifying compensatory awards, require separate elements of proof such as malice, fraud, or gross negligence. Moreover, respondents observe that many courts require or permit evidence of a defendant's wealth, a factor not generally permitted when only compensation is sought. Because such evidence is necessary in order for a jury to assess punitive damages, but irrelevant to the merits of other claims, many jurisdictions also require that the punitive damages counts be tried separately from proceedings that determine compensatory awards.

Section 1407(a) provides that "civil actions involving one or more common questions of fact . . . may be transferred [by the judicial panel on multidistrict litigation] to any district for coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). At or before conclusion of the pretrial procedures, the Panel is to remand those cases to the districts from which they were originally transferred, "*[p]rovided, however,* That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded." *Id.*

Essentially, the petitioners would have us construe "claim" in section 1407(a) to be synonymous with "cause of action," and a request for punitive damages to be merely an "issue" as that term is used in Federal Rule of Civil Procedure 42(b). We reject these contentions. As a term of art and in common parlance, the meaning of "claim" is not so circumscribed. For example, a cause of action based upon negligence frequently is described as including "claims" for property damage, lost wages, medical bills, and pain and suffering. Neither the statute's language nor the snippets of legislative history cited to us provides a basis for adopting the petitioners' crabbed reading of the word. Rather, the legislative history of section 1407 demonstrates "that Congress intended transferee courts to have broad pretrial authority." *Patenaude*, 210 F.3d at 144. In our view, the Panel's expansive interpretation of "claim" is the more reasonable one and that which we endorse.

Furthermore, although a demand for punitive damages does not stand alone, it is not simply a component of a claim inseparable from the whole. This distinctiveness is demonstrated by case law allowing new trials devoted solely to determining punitive damages. *See, e.g., Denesha v. Farmers Ins. Exch., Inc.*, 161 F.3d 491, 505 (8th Cir.1998); *Jannotta v. Subway Sandwich Shops, Inc.*, 125 F.3d 503, 517 (7th Cir.1997). Separate trials of punitive damages claims are also permitted. *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 474-75 (5th Cir.1986). A request for punitive damages is similar to a derivative claim, such as for loss of consortium, and may properly be characterized as "a separate but dependent claim for relief" that must be supported by

independent allegations and proof. 1 James D. Ghiardi, et al., *Punitive Damages L. & Prac.*, § 12.07 at 22-23, 25 (1999).

In addition, the statute grants unusually broad discretion to the Panel to carry out its assigned functions. Subsection (e) provides that "[n]o proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code." This vehicle that Congress chose for review is one that we have held should only be granted "in response to an act amounting to a judicial usurpation of power." *Patenaude*, 210 F.3d at 140. Petitioners have the burden to establish that they "have no other adequate means to attain the desired relief, and . . . that [their] right to the writ is clear and indisputable. . . . Even when these requirements are met, issuance of the writ is largely discretionary." *Id.* at 141. In this way, Congress granted substantial authority to the Panel to decide how the cases under its jurisdiction should be coordinated. It is significant that section 1407(a) directs that the Panel act "for the convenience of parties and witnesses and . . . promote the just and efficient conduct of such [civil] actions."

An even more compelling reason to adopt the Panel's interpretation is the public policy underlying the practice of severing punitive damages claims. In *Patenaude*, we quoted the transferee court's objectives in resolving the thousands of cases assigned to it – "that the sick and dying, their widows and survivors should have their claims addressed first." *Id.* at 139. The Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation accurately appraised the problem:

> "Although there may be grounds to support an award, multiple judgments for punitive damages in the mass tort context against a finite number of defendants with limited assets threaten fair compensation to pending claimants and future claimants who await their recovery, and threaten the economic viability of the defendants. To the extent that some states do not [sic] permit punitive damages, such awards can be viewed as a malapportionment of a limited fund. Meritorious claims may go uncompensated while earlier claimants enjoy a windfall unrelated to their actual damages."

Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation at 32 (March 1991).

Punitive damages are a windfall to the recipients over and above compensatory damages to which they are entitled. Indeed, in some jurisdictions, punitive damages are paid in part to the state rather than the individual plaintiff. *See* Alaska Stat. § 9.17.020(j); Ga.Code Ann. § 51-12-5.1(e)(2) (product liability cases); Utah Code Ann. § 78-18-1(3).

The resources available to persons injured by asbestos are steadily being depleted. The continuing filings of bankruptcy by asbestos defendants disclose that the process is accelerating. It is responsible public policy to give priority to compensatory claims over exemplary punitive damage windfalls; this prudent conservation more than vindicates the Panel's decision to withhold punitive damage claims on remand. It is discouraging that while the Panel and transferee court follow this enlightened practice, some state courts allow punitive damages in asbestos cases. The continued hemorrhaging

of available funds deprives current and future victims of rightful compensation.

Petitioners have failed to persuade us that the Panel ruling was erroneous. The petition does not demonstrate the extraordinary circumstances permitting us to issue a writ of mandamus, much less compel us to exercise our discretion and grant the request.

The petition for mandamus will be denied.

APPENDIX B

§ 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district

judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by –

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed.

The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.